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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, et al.,

Petitioners,

v.

CITY OF LAGO VISTA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This *amicus curiae* brief of the Cato Institute is filed with the permission of Petitioners and a copy of the letter of consent is filed herewith. Respondents did not object to the filing of this brief, but the requested letter of consent was not procured by the filing deadline. This Motion for Leave to file this *amicus curiae* brief is submitted praying for this Honorable Court's leave to file this brief in support of Petitioners.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of the Bill of Rights, including the constitutional protections against warrantless and unreasonable seizures. *See e.g.*, Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000). The instant case raises important questions concerning the power to effect warrantless arrests and is thus of substantial interest to the Cato Institute.[1]

STATEMENT OF FACTS

The Texas Transportation Code authorizes police agents to arrest people who disobey code regulations. Tex. Transp. Code Ann. § 543.001. The Texas Transportation Code requires people to wear seatbelts when operating a motor vehicle. Tex. Transp. Code Ann. § 545.413 (1999). The penalty for not wearing a seatbelt is a maximum fifty dollar fine. Tex. Transp. Code Ann. § 545.412(b).

Gail Atwater was arrested for failing to wear her seatbelt while driving her automobile. Ms. Atwater was

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[1] In conformity with Supreme Court Rules, *amicus* states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

handcuffed in public and was then transported to the local jail. After approximately one hour, Ms. Atwater appeared before a judicial magistrate and was released from custody after posting bail.

Ms. Atwater subsequently brought a legal action against the local municipality, the City of Lago Vista, alleging that her constitutional rights had been violated. This case presents the question of whether the Texas legislature can bypass the warrant requirement of the Fourth Amendment and empower executive branch officials to effect warrantless arrests for misdemeanor offenses that do not involve a breach of the peace.

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution guarantees our right to be free from unreasonable seizure at the hands of government officials. At the core of the Fourth Amendment lie fundamental protections of the common law. Among the protections afforded citizens at common law was the prohibition on warrantless arrests for minor offenses unless they involved a breach of peace.

The United States Court of Appeals for the Fifth Circuit ignored this time-honored prohibition and instead forged a more malleable balancing approach to determine the reasonableness of Gail Atwater's arrest. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-245 (1999). The proper balance in this case, however, was struck centuries ago in

the traditions of the common law. Under a proper understanding of the Fourth Amendment based upon the common law and first principles, Ms. Atwater and others who violate minor laws that do not breach the peace cannot be subject to a warrantless, custodial arrest.

ARGUMENT

I. THIS COURT SHOULD DRAW ON THE COMMON LAW PRINCIPLES AT THE CORE OF THE FOURTH AMENDMENT BY RECOGNIZING THE TIME-HONORED PROHIBITION OF WARRANTLESS ARRESTS FOR MINOR OFFENSES NOT INVOLVING A BREACH OF THE PEACE.

The Fourth Amendment to the United States Constitution declares that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " A full custodial arrest of an individual – like the arrest of Gail Atwater in this case – is the "quintessential 'seizure of the person' " under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An arrest has been traditionally defined as the "grasping or application of physical force" by a police officer to a citizen. *Id.* It constitutes one of the most powerful and dramatic applications of state power to an individual. Not only do arrests constitute serious infringements on liberty, they also carry real-world consequences to individual citizens. The statement "So-and-So had been arrested" still carries enough shock value to most people that even a relatively routine arrest and detention like that experienced by Ms. Atwater could have serious

repercussions among neighbors, friends, and family. That is one of the reasons why strict rules governing arrests evolved at common law and were constitutionalized by the Fourth Amendment.

The Fourth Amendment establishes a "practical compromise between the rights of individuals and the realities of law enforcement." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). Courts normally define the proper balance between these two principles to determine which searches and seizures are reasonable. *See e.g., Payton v. New York*, 455 U.S. 573, 585 (1980) (a warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable"). For the issue in this case, the balance has already been struck centuries ago in the traditions of the common law.

The common law prohibited the warrantless arrest of an individual for a minor offense unless it involved a breach of the peace. A "peace officer" at common law had "no power of arresting without warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Halsbury's Laws of England*, vol. 9, part III, 612 (*quoted in Carroll v. United States*, 267 U.S. 132, 156 (1925)).

This common law guarantee has direct bearing on protections afforded individuals under the Fourth Amendment. As Justice Story noted, the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution* 748 (1833). This Court has also held that the "common law . . . has guided

interpretation of the Fourth Amendment." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1976). Typically, the Fourth Amendment assures protection of the common liberties of citizens that were guaranteed at the time of the Founding. *Hodari D.*, 499 U.S. at 633-34. In this case, the common law could not be more clear or straightforward: warrantless arrests for minor offenses are prohibited unless they involve a breach of the peace.

II. THE COMMON LAW FOUNDATION OF THE FOURTH AMENDMENT IS CONSTANTLY BEING THREATENED BY LEGISLATIVE ABROGATION.

It is important for this Court to recognize that the instant case is about *legislative power*. The Fourth Amendment will lose all of its vitality if the legislature can simply abrogate the common law principles that were in place at the founding.

Very serious incursions have already been established. Professor Thomas Davies recently completed important research showing that warrants were the central component of the common law regime at the time of the framing. *See* Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). During the nineteenth century, however, courts and legislatures expanded the power of executive branch agents to conduct warrantless arrests. *Id.* at 634-642. Of course, the common law right against false imprisonment was simultaneously "redefined." *See id.* at 641 n. 256. *See also* Lynch, *'We Own the Night:' Amadou Diallo's Deadly Encounter With New York City's Street Crimes Unit*, Cato Institute Briefing Paper No. 56, March 31, 2000.

The legislature has also acquired the power to override the common law of trespass by simply making it a crime for someone to refuse admittance to executive branch officials. *See e.g., Frank v. Maryland*, 359 U.S. 360 (1959); *Donovan v. Dewey*, 452 U.S. 594 (1981). *Note also Santikos v. State*, 836 S.W. 2d 631 (1992) (Texas statute authorizing warrantless inspections "at any time."); *Foe v. Ohio Liquor Control Commission*, 694 N.E.2d 905 (1998) (Ohio statute authorizing unannounced, no-knock, warrantless inspections).

Moreover, under the common law, Americans had the right to resist an unlawful arrest. *See United States v. DiRe*, 332 U.S. 581, 594 (1948). But that "check" upon state agents is also being abrogated by legislatures. *See State v. Hobson*, 577 N.W. 2d 825 (1998) (collecting cases). *Note also State v. Valentine*, 935 P. 2d 1294 (1997) (Sanders, J., dissenting); *State v. Bradshaw*, 541 P. 2d 800 (1975).

It is disturbing to consider what the American legal landscape will look like in thirty years if such inroads continue. If legislators can override the law of trespass and eliminate the right to resist an unlawful arrest, can they clothe executive branch agents with an irrebuttable presumption of immunity against false arrest and malicious prosecution? *Cf. Dragna v. White*, 280 P. 2d 817 (1955). Can they transfer the warrant-issuing power from the judicial branch to the executive branch? *See e.g., Smith v. United States*, No. 93-1543 (5th Cir. 1994), *cert. denied*, 513 U.S. 811 (1994) (No. 93-1842). Whether such legislative powers are constitutionally permissible would seem to turn upon whether certain common law principles were "constitutionalized" by the Fourth Amendment. *See*

Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J. L. & PUB. POL'Y 711 (2000).

Another question raised by the instant case is this: If the Texas legislature can abrogate the common law and empower executive agents to make warrantless arrests for fine-only offenses, can it go even further and authorize the use of deadly force to stop a fleeing misdemeanant? (*See e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (O'Connor, J., dissenting)). If not, why not?

This Court has thwarted several legislative and executive attempts to dilute Fourth Amendment safeguards. *See e.g., Richards v. Wisconsin*, 520 U.S. 385 (1997) (holding that the common law "knock and announce" rule cannot be abrogated); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that the legislature may not transfer the probable cause determination from the judicial branch to the executive branch). It is vitally important to thwart the instant attempt by the Texas legislature to override the common law and to expand the power of executive branch agents to effect the arrest of citizens for minor offenses that do not involve a breach of the peace.

CONCLUSION

For the foregoing reasons, *amicus curiae* Cato Institute urges this Court to reverse the *en banc* ruling of the Fifth Circuit Court of Appeals.

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